No. 10-463

IN THE

Supreme Court of the United States

DON ADDINGTON, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

US AIRLINE PILOTS ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

NICHOLAS P. GRANATH
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405
(612) 341-9080

LEE SEHAM
Counsel of Record
LUCAS K. MIDDLEBROOK
STANLEY SILVERSTONE
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue
Suite 1204
White Plains, NY 10601
(914) 997-1346
lseham@ssmplaw.com

Attorneys for Respondent US Airline Pilots Association

233427

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Petitioners' duty of fair representation (DFR) claim against their union is *ripe* where it targets a contract proposal (concerning seniority) that is the subject of ongoing bargaining and has yet to become part of any final product of negotiation in the form of a signed and ratified collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent discloses as follows:

Respondent is a labor representative, or union, within the meaning of the Railway Labor Act, 45 U.S.C. § 151, Sixth, and therefore has no parent corporation, has no stock, and no publicly held corporation owns any part of it.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES xi

STATUTORY PROVISION INVOLVED 1

INTRODUCTION 1

COUNTER-STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 15

I. There Is No Conflict With This Court Because It Has Clarified That DFR Suits Over Substantive Terms Of Contract First Require A "Final Product Of Bargaining." 15

II. The Mere Allegation That The Ninth Circuit's Ripeness Analysis Was Incorrect Is Not A Valid Ground For Review 26

CONCLUSION 34

APPENDIX

Resp. App. A: Stipulation (Doc. # 77) 1a

Resp. App. B: Pretrial Oder (Doc. # 417) [extract] . 7a

TABLE OF AUTHORITIES

CASES

Addington v. US Airline Pilots Ass'n, 606 F.3d 1174 (9th Cir. 2010) ..... *passim*

Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991) ..... *passim*

Allegheny-Mohawk Merger Case, 59 C.A.B. 45 (April 10, 1972) 20

Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972) 31

Associated Transport, Inc., 185 N.L.R.B. 631 (1970) 13

Barlow v. American Nat'l Can Co., 173 F.3d 640 (8th Cir. 1999) 22

Bensel v. Allied Pilots Ass'n., 387 F.3d 298 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005) ... 22

Bernard v. Air Line Pilots Ass'n, 873 F.2d 213 (9th Cir. 1989) 21

Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co., 373 U.S. 33 (1963) 31

Breeger v. US Airline Pilots Ass'n, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009) 22

Clayton v. Int'l Union, 451 U.S. 679 (1981) 15

Consol. Rail Corp. v. Ry. Labor Execs. Ass'n, 491 U.S. 299 (1989).....31

Delta Airlines v. August, 450 U.S. 346 (1981) 17

Dolan v. Ass'n of Flight Attendants, 1996 U.S. Dist. LEXIS 3342 (N.D. Ill. Mar. 20, 1996) 22

Feazell v. Tropicana Products, Inc., 819 F.2d 1036 (11th Cir. 1987) 6

Federal Express Corp. v. Air Line Pilots Ass'n, 67 F.3d 961 (D.C. Cir. 1995).....22

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) ..30

FTC v. Standard Oil Co., 449 U.S. 232 (1980).....32

H. K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970).....23

Hagerman v. Transportation Union, 281 F.3d 1189 (10th Cir. 2002).....22

Hardcastle v. W. Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962) 30

Hass v. Darigold Dairy Prods. Co., 751 F.2d 1096 (9th Cir. 1985).....30

Hendricks v. Airline Pilots Ass'n, 696 F.2d 673, (9th Cir. 1983) 21

Huff v. Int'l Union of Sec. Officers, 2002 U.S. Dist. LEXIS 2003 (N.D. Cal. Jan. 31, 2002) 22

Humphrey v. Moore, 375 U.S. 335 (1964) 24

Kozy v. Wings W. Airlines, Inc., 89 F.3d 635 (9th Cir. 1996) 22

Lambert v. Wicklund, 520 U.S. 292 (1997) 18

Laturner v. Burlington N., Inc., 501 F.2d 593 (9th Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975) 24

Local No. 48, United Bhd. of Carpenters & Joiners of America v. United Bhd. of Carpenters & Joiners of America, 920 F.2d 1047 (1st Cir. 1990) 25

Merritt v. IAM Dist. 143, 613 F.3d 609 (6th Cir. 2010) 30

Naugler v. Air Line Pilots Ass'n, Int'l, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008) 8

Newell v. Electrical Workers, 789 F.2d 1186 (5th Cir. 1986) 25

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 27

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) 31

Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters, 275 F. Supp. 986 (S.D.N.Y. 1967) ... 24

Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209 (1938) 32

Ramey v. Machinists Dist. 141, 378 F.3d 269 (2d Cir. 2004) 22

Ratkosky v. United Transp. Union, 843 F.2d 869 (6th Cir. 1988) 22, 30

Reed v. United Transportation Union, 488 U.S. 319 (1989) 15

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 32

Ross v. Moffitt, 417 U.S. 600 (1974) 27

Rudolph v. United States, 370 U.S. 269 (1962) 27

Sergeant v. Inlandboatman's Union, 346 F.3d 1196 (9th Cir. 2003) 24

Sim. v. New York Mailers Union No. 6, 166 F.3d 465 (2d Cir. 1999) 25

Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924) 27

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 1

Texas v. Mead, 465 U.S. 1041 (1984) 27

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) 23

United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985) 22

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 17

United States v. Bass, 536 U.S. 862 (2002) 18

United States v. Johnson, 268 U.S. 220 (1925) 27

United States v. United Foods, Inc., 533 U.S. 405 (2001) 18

US Airways MEC v. America West MEC, 525 F. Supp. 2d 127 (D.D.C. 2007) 8

Vestal v. Hoffa, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) 25

Williams v. Pac. Mar. Ass'n, 617 F.2d 1321 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981) 21

Youakim v. Miller, 425 U.S. 231 (1976) 17

STATUTES

Labor Management Reporting & Disclosure Act, 29 U.S.C. § 401(a).....17, 24

McCaskill-Bond Amendment, 49 U.S.C. § 42112 (Pub. L. 110-161, Dec. 26, 2007, 121 Stat. 2383)..... 1, 2, 4, 19, 20

Railway Labor Act, 45 U.S.C. § 151 *et seq*..... *passim*

45 U.S.C. § 152, Fourth 10, 24

45 U.S.C. § 151, Sixth ii

45 U.S.C. § 152, Ninth 24

RULES

Sup. Ct. R. 10 .....27, 33

Sup. Ct. R. 15(2) 3

Sup. Ct. R. 29.6 ii

TREATISES

William W. Osborne, Jr., *Labor Union Law and Regulation*, (BNA Supp. 2007) 23

TABLE OF APPENDICES

Respondent's Appendix A: Stipulated Statement of Facts Re: Plaintiffs' Application For Preliminary Injunction (Doc. # 77; Nov. 3, 2008) 1a

Respondent's Appendix B: Order (Doc. # 417; April 30, 2009) [extract] 12a

STATUTORY PROVISION INVOLVED

Contrary to the Petitioners' claim, the relevant statutory provision is *not* the McCaskill-Bond Amendment. That statute was never referenced by the Petitioners below.[1] Moreover, under its express terms, that statute has no application to mergers that occurred prior to 2008 or to mergers involving employee groups represented by a single labor union. The relevant statutory provision is the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA" or the "Act"). The only claim raised below, dismissed as unripe, was an alleged violation of the duty of fair representation ("DFR"). Under *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944) and its progeny, DFR claims arise under the RLA.

INTRODUCTION

Following a merger of unionized airlines, Petitioners sued on a DFR claim, over a term of contract not yet written, in an effort to compel Respondent, their union, to adopt a prior union's proposed term of seniority. The district court improperly determined the case was ripe, despite the undisputed fact that collective bargaining was ongoing, and no contract incorporating the seniority proposal had been negotiated or ratified by union

---

[1] The Petitioners never even mentioned McCaskill-Bond until *after* the Ninth Circuit issued its decision and they filed their request for rehearing *en banc*. *See supra* at p. 16, n. 12.

members (as required by Respondent's constitution). The Ninth Circuit reversed and ordered dismissal for lack of jurisdiction finding that the claim was not yet ripe under *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) ("*O'Neill*") and settled DFR jurisprudence. *O'Neill* and subsequent lower court decisions have held that DFR claims over substantive contract terms can only be brought *after* negotiations are complete and a "final product of bargaining" is reached.

Petitioners make two arguments for review: First, that delay in addressing their claim is inconsistent with an inchoate policy favoring quick resolution of "union disputes." Second, that the Ninth Circuit misapplied controlling law. Both arguments ignore this Court's "final product" rule; neither argument was ever raised below. Thus, the Petition presents no true conflict with this Court's precedent. Nor does the petition present any conflict with federal statute because McCaskill-Bond, by its express terms, does not apply to existing seniority integration processes. Finally, no conflict with any lower court is even claimed, nor could it be given the Supreme Court's prevailing precedent embodied in *O'Neill*.[2]

Instead, Petitioners merely invite this Court

---

[2] Petitioners, in their request for *en banc* rehearing, admitted that the Ninth Circuit's decision "decid[ed] a matter of first impression for all federal circuits." Therefore, it is undisputed that no circuit split exists.

to overturn four decades of settled precedent under *O'Neill*, which established a bright line between the process of collective bargaining and its final product. If accepted, Petitioners' argument would completely undermine the federal policy of prohibiting the federal judiciary's unnecessary entanglement in substantive collective bargaining and internal union governance.

COUNTER-STATEMENT OF THE CASE

Respondent adopts the statement of facts set forth in the Ninth Circuit's opinion below (App. 1a), but briefly summarizes the relevant background in order to correct the multiple "misstatement[s] of fact" made in Petitioners' Statement of the Case. *See* Sup. Ct. R. 15(2).

In 2005, US Airways, Inc. and America West Airlines, Inc. merged into a single carrier known as US Airways. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1177 (9th Cir. 2010). The merger raised the issue as to how seniority would be integrated between the two airlines' respective employee groups. With the exception of the pilots, every unionized employee group at US Airways proceeded with integration on the basis of date-of-hire seniority ("dovetailing").

At the time of the merger, the Air Line Pilots Association ("ALPA") was the collective bargaining agent for *both* the US Airways pilots ("East") and the

America West pilots ("West"). *Id.* Under the ALPA structure, the two pilot groups' separate collective bargaining agreements ("CBA") were administered by their respective Master Executive Councils ("MEC's"). *Id.*

ALPA maintained an internal union "Merger Policy" which provided that, in the absence of an agreement between (unelected) "Merger Representatives," ALPA's seniority integration proposal would be determined by an internal union Arbitration Board composed of two non-voting ALPA members chosen from ALPA's Master List of Pilot Neutrals and an ALPA-approved arbitrator who acted as the Arbitration Board's Chairman.[3] Petitioners have mischaracterized the internal ALPA arbitration process as "follow[ing] procedures that were subsequently codified into federal law by the McCaskill-Bond Amendment." (Pet. 3). This is a serious misstatement of fact.

Rather, the arbitration was conducted pursuant to ALPA's own *internal* Merger Policy and procedures and not the Allegheny-Mohawk process referenced in the McCaskill-Bond legislation. 606 F.3d at 1177-78.

---

[3] Petitioners have misled this Court by asserting that individual pilots "agreed" to the procedures contained in ALPA Merger Policy. (Pet. 3). ALPA Merger Policy was never agreed to at any juncture by the "pilots" – individually or collectively. Rather, as explained herein, the policy was imposed by an Executive Board that was *not elected* by pilots. Far from agreeing to it, any pilot-member was subject to expulsion and or fine if she/he failed to adhere to the imposed policy.

Thus, the undisputed facts establish two reasons why the McCaskill-Bond Amendment has no application to this matter: First, it has no application to mergers pre-dating the year 2008, whereas the merger in this case occurred in 2005. Second, by its own terms, the McCaskill-Bond Amendment has no application where, as in the instant matter, the two employee groups are both represented by the same union:

> [I]f the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section

(App. C). Significantly, ALPA Merger Policy was a far cry from the Allegheny Mohawk Labor Protective Provisions. Indeed, Petitioners' invocation of Allegheny Mohawk principles is strikingly ironic considering that the only seniority integration arbitration at US Airways that *did* follow these procedures produced a date-of-hire seniority integration, a result that Petitioners assert would violate DFR standards.

Petitioners stipulated before trial that the "East and West ALPA MEC merger representatives submitted" the seniority dispute to arbitration before a board chaired by Arbitrator Nicolau. (Resp. App. A, 5a at ¶ 26). The district court, in its final pretrial order, adopted that same stipulation. (Resp. App. B,

13a at ¶ 14). The Ninth Circuit relied on this stipulation to make the same finding. 606 F.3d at 1177. Before this Court, however, Petitioners attempt to abandon their stipulation by alleging that individual pilots were the actual parties and that these pilots "agreed to use binding arbitration." (Pet. 2). The allegation is false. Moreover, Petitioners' stipulation remains binding and cannot simply be jettisoned on appeal to suit a belated litigation strategy. *Feazell v. Tropicana Products, Inc.*, 819 F.2d 1036, 1040 (11th Cir. 1987) ("matters stipulated to in a pretrial order are binding on the parties unless modified and normally cannot be objected to on appeal.").[4]

The ALPA Merger Representatives were subject to fine or expulsion from ALPA if they resisted the ALPA-governed process or merger criteria. The Arbitration Board itself was obligated to render a decision consistent with criteria set forth in ALPA Merger Policy. Whereas these criteria had historically placed primary emphasis on date-of-hire seniority, in 1991, ALPA Merger Policy had been amended (without a vote of the rank-and-file pilots) to eliminate any reference to date-of-hire seniority.[5]

On September 23, 2005, US Airways, America West and ALPA entered into a "Transition

---

[4] It is undisputed that USAPA was not a party to the Nicolau arbitration.

[5] ALPA has since modified its internal Merger Policy yet again, this time to re-introduce longevity as a criterion upon which seniority integration could be based.

Agreement" ("TA"), which addressed the process of the two airlines' operational merger as it related to the pilots. 606 F.3d at 1177. "Under the TA, the carriers agreed not to object to ALPA's seniority integration proposal provided it did not result in certain additional costs." *Id.* As with ALPA Merger Policy and the ALPA Constitution, rank-and-file pilots were never allowed to vote on the TA.

Nevertheless, under ALPA Merger Policy the "seniority integration proposal could be implemented only as part of a single CBA." *Id.* Pursuant to ALPA policy, that single CBA "would require approval by the East Master Executive Council, the West Master Executive Council, and a majority of each of the East and West pilot groups, effectively giving each side a *veto*." *Id.* (emphasis added). Therefore, at the tail end of the process, ALPA policy allowed individual pilots to vote yes or no on any contract incorporating the arbitrated seniority integration proposal.

In the instant case, the ALPA arbitration culminated in a May, 2007 decision referred to as the Nicolau Award. *Id.* at 1177. The Nicolau Award disregarded date-of-hire seniority principles in favor of granting super seniority to more junior West pilots, based ostensibly on a snapshot evaluation of the respective airlines' economic status at the time of the merger. It resulted, for example, in the placement of probationary West pilots with under *two months* seniority above East pilots who had more than *sixteen years* of credited length of service.

A vigorous dissent by Arbitration Board member Captain James Brucia objected that the Nicolau Award improperly failed to consider post-merger evidence confirming the economic opportunities inherent in the vitality of East operations and higher East pilot attrition rates. Chairman Nicolau responded in his opinion that ALPA Merger Policy prohibited him from considering this evidence.[6]

The Nicolau Award provoked state court litigation between the East and West MEC's over whether the Award had properly adhered to ALPA Merger Policy criteria; however, this litigation was discontinued after ALPA's decertification and the consequent dissolution of the two MEC's. *See US Airways MEC v. America West MEC*, 525 F. Supp. 2d 127 (D.D.C. 2007). The Nicolau Award also provoked federal court litigation by an East pilot group against ALPA based on ALPA's allegedly deliberate introduction of an erroneous East pilot seniority list, which prejudiced their standing on the Nicolau list. *Naugler v. Air Line Pilots Ass'n, Int'l*, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). That federal court litigation is still pending.

---

[6] Petitioners twice make reference to a "thousand East Pilots" who were on furlough at the time of the merger. (Pet. 3-4). However, Petitioners have deliberately omitted any reference to the applicable *time frame* of these furloughs, and the fact that Arbitrator Nicolau asserted that ALPA Merger Policy forbade him from considering the fact, known during the arbitration, that all of these pilots would be returning to work by the end of *2007*.

As the Ninth Circuit held, "[a] majority of East Pilots strenuously objected to the Nicolau Award and opposed its implementation ... [and] the East Master Executive Council determined that the East Pilots would never ratify a CBA that incorporated the Nicolau Award." 606 F.3d at 1178.[7] ALPA attempted to break the Nicolau-generated "impasse" by sponsoring intense efforts to foster a compromise between its West and East MECs. ALPA Merger Policy only required ALPA to use all "reasonable means" to negotiate for the implementation of the seniority integration proposal provoked by the Arbitration Board. *Id.* at 1177. ALPA, however, was unsuccessful in its attempt to get the East and West Pilots to "reach a compromise." *Id.* at 1178. During these efforts, ALPA applied "extreme pressure" on the West MEC to moderate its position; however, the West MEC persisted in its refusal to compromise for any seniority solution other than the Nicolau Award.

From August 17, 2007 until the date of ALPA's decertification on April 18, 2008, there were no further negotiations towards a single CBA between ALPA and US Airways. *Id.* at 1178. An impasse had arisen, and it was an impasse of potentially *indefinite duration* since neither the TA nor ALPA Merger Policy contained a timetable or deadline within which to complete a new, single

---

[7] Petitioners stipulated to this fact prior to trial, and the stipulation was adopted by the district court as part of the final pretrial order. (Resp. App. B, 13a at ¶ 16).

CBA. The Ninth Circuit specifically recognized the existence of this impasse – and its practical effect:

> ALPA had been unable to broker a compromise between the two pilot groups, and the East pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.

Id. at 1180.

Dismayed with the inability to secure a combined contract, and otherwise dissatisfied with past ALPA representation, certain East pilots formed an independent union, USAPA, to challenge ALPA as the pilots' collective bargaining agent.[8] USAPA campaigned on a platform of democracy, accountability, and overcoming the existing impasse by constructing a new seniority integration proposal that would effectively preserve for *both* East and West pilots the job opportunities generated by their respective operations. In furtherance of this platform, "USAPA adopted a constitution that established an 'objective' of 'maintaining uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and

---

[8] As is their right under the RLA (45 U.S.C. § 152, Fourth).

restrictions to preserve each pilot's un-merged career expectations.'" *Id.*

On "November 29, 2007, the National Mediation Board certified a representation election. USAPA won the election and was certified as the collective bargaining representative for the entire group of pilots, East and West, on April 18, 2008." *Id.* Subsequent to its certification, USAPA formed a negotiating committee and resumed collective bargaining with the carrier; however, USAPA had not yet submitted any seniority proposal to the carrier when, on September 4, 2008, Petitioners commenced their action claiming that USAPA breached its duty of fair representation because it merely "*intended*" not to adopt its predecessor's unratifiable seniority proposal.

On September 30, 2008, USAPA presented to the carrier its first seniority integration proposal. *Id.* Consistent with its constitutional objective, the USAPA seniority integration proposal provided for a combined list based on date-of-hire, modified with conditions and restrictions designed to protect each pilot's un-merged career expectations.[9] For example, the proposal provided for a ten-year "fence" that

---

[9] Petitioners mislead this Court, yet again, by claiming that USAPA's seniority integration proposal is "strict" date-of-hire. (Pet. 3-4). USAPA's proposal, with its conditions and restrictions, represents such a departure from strict date-of-hire that USAPA has been subject to repeat litigation threats *from East pilots* who assert that their seniority-based bidding rights will be unfairly diminished.

would prevent senior East pilots from displacing junior West pilots from their existing positions and preserve the promotional opportunities arising from West attrition *exclusively* for West pilots. Significantly, within the specified ten-year time frame, the majority of East pilots will have retired, thereby opening up hundreds of promotional opportunities for junior West pilots within East operations – opportunities that were never previously available to them. US Airways "had not yet responded to the proposal when the district court entered its permanent injunction." *Id.*

Petitioners' complaint in this litigation consisted of three counts. Counts I and II were brought against US Airways. Count I alleged that, in its planned implementation of pilot furloughs, the Company failed to furlough in accordance with the Nicolau list, but instead, furloughed from East and West operations independently in accordance with the respective East and West pilot seniority lists. Count II alleged that US Airways had failed to bargain in good faith toward the implementation of the Nicolau Award as allegedly required by the Transition Agreement. The district court dismissed both Count I and Count II on the grounds that the alleged claims were contract-based and, therefore, within the exclusive jurisdiction of an RLA arbitration panel referred to as the System Board. 606 F.3d at 1178.

Count I was later arbitrated in a grievance

brought by USAPA, and it was determined by a System Board arbitrator that the Company's decision to disregard the Nicolau Award in its furlough of West pilots in 2008 was in accordance with the contract. Petitioners were invited to participate in this grievance, but declined to do so. With respect to Count II, it is undisputed that a hearing date before the System Board was subsequently scheduled to allow Petitioners to present this claim in the appropriate forum. Petitioners, however, declined to proceed.

The district court proceeded to trial on the Count III DFR claim, later determined by the Ninth Circuit to be unripe. During the trial, the district court barred USAPA from presenting any evidence or argument concerning:

- The process, procedure or decision of the Nicolau Award despite clear precedent allowing unions, based on principled objections to the process, to revisit seniority integration instituted through a disputed arbitration. *See Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970) (union entitled to renegotiate seniority terms that were the subject of a prior arbitration);
- Any evidence of other seniority integrations at US Airways that resulted in a date-of-hire system despite existing case law that specifically referenced industry standards in general, and the seniority integration of other employee groups in particular, as evidence

supporting that the union acted within a wide range of reasonableness;

- Any evidence challenging the independent merits of ALPA Merger Policy, including evidence detailing how ALPA Merger Policy had undergone a political process whereby consideration of a pilot's date-of-hire had been deliberately excised in 1991 without a vote of rank-and-file pilots.

Subsequent to a finding of liability, the district court ordered USAPA to adopt, as its own, the Nicolau proposal of its decertified predecessor, which ALPA itself had been unable to implement. In addition, the court order forbade any modification of the Nicolau proposal, thereby prohibiting USAPA from continuing ALPA's efforts to seek a satisfactory middle ground. The injunction also forbade USAPA from continuing ALPA's efforts to negotiate interim modifications of the two existing East and West CBA's. *See* 606 F. 3d. at 1178 (setting forth injunction terms).

On multiple grounds, including ripeness, USAPA appealed the district court's decision on an expedited basis to the Ninth Circuit Court of Appeals. On June 4, 2010, the Ninth Circuit determined (in a published decision) that the DFR claim was never ripe and remanded to the district court "with directions that the action be dismissed." 606 F.3d at 1184.

On June 10th of this year, Petitioners moved the Ninth Circuit for a rehearing *en banc* but that request was denied on July 8 when not a single Ninth Circuit justice requested a vote.[10] Petitioners then filed a motion to stay issuance of the mandate pending the filing of their Petition to this Court, which was also summarily denied by the Ninth Circuit. On August 13, 2010, Petitioners' lawsuit was dismissed by the district court.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict With This Court Because It Has Clarified That DFR Suits Over Substantive Terms Of A Contract First Require A "Final Product Of Bargaining."

The first of Petitioners' two arguments is that the Ninth Circuit's ruling – that Petitioners' DFR claim is unripe because it was brought prior to a negotiated and ratified contract – is in "conflict" with "federal policy that strongly favors prompt resolution of divisive internal union disputes that affect collective bargaining." (Pet. 7). Specifically, Petitioners assert this ruling conflicts with *Reed v. United Transportation Union*, 488 U.S. 319 (1989), *Clayton v. Int'l Union*, 451 U.S. 679 (1981), and the 2007 McCaskill-Bond Amendment (*see* 49 U.S.C. §

---

[10] On the same date, Petitioners' petition for clarification was also summarily rejected by the Ninth Circuit.

42112 "Labor Integration").[11] With respect to the alleged conflict with the two cited cases, the following reasons require rejection of Petitioners' "prompt resolution" argument:

First, Petitioners' "prompt resolution" argument was *never made below* to the Ninth Circuit or the district court. Hence, that argument is nowhere addressed in the Ninth Circuit's ripeness analysis. More specifically, Petitioners failed to cite *Reed*, *Clayton*, or the McCaskill-Bond Amendment for this proposition. Rather, Petitioners' argument below was limited to the contention that their DFR claim ripened when Respondent announced its *intent* to negotiate a seniority term proposal that was other than the proposal demanded by Petitioners.

Because Petitioners' "prompt resolution" argument presents a question they failed to raise in any lower court in this proceeding, it is not a ground upon which to grant review under the settled jurisprudence of this Court.[12] *See e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to consider arguments not presented by

---

[11] Pub. L. 110-161, Div. K, Title I, § 117, Dec. 26, 2007, 121 Stat. 2383.

[12] Petitioners argued, for the first time in their petition for *en banc* rehearing, that McCaskill-Bond reflected a "strong federal policy favoring peaceful, efficient integration of airline operations." That petition for *en banc* rehearing was, however, rejected without a single Ninth Circuit justice requesting that a vote be taken.

petitioner below); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court"); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us").[13]

Second, there is no genuine conflict with any decision of this Court, including *Reed* or *Clayton*. The controlling case is *O'Neill*. *O'Neill* specifically clarified the final product rule: "[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78. Neither *Reed* (1989) nor *Clayton* (1981), which preceded *O'Neill* (1991), addressed the final product rule or even ripeness of DFR claims.[14] *Reed* addressed the question of the statute of limitations for claims brought under the Labor Management Reporting and Disclosure Act ("LMRDA"). It did not concern DFR claims under the RLA, nor the ripeness of any claim. *Clayton* did not address ripeness of DFR claims, rather it addressed the extent to which

---

[13] Petitioners have twice sought to renew their dismissed claim outside of this Petition, once on a Rule 60(b) motion and once as a cross-claim in a third-party suit. On both occasions, Petitioners have alleged ripeness based on the same argument they made to the Ninth Circuit – but not the argument they raise here for the first time.

[14] The same is true of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), which Petitioners cite but claim no conflict with.

a union member is obligated to exhaust internal-union appeal procedures.[15] Because neither *Reed* or *Clayton* addressed ripeness of DFR claims challenging a union over the substance of its bargaining, *O'Neill*, which followed all of them, naturally does not reference these decisions. Petitioners' claim of a conflict with this Court falls flat. It lacks citation to any case that holds – contrary to *O'Neill* and its progeny – that a DFR claim over a substantive term of a contract is ripe before that term is negotiated and ratified as part of a final product of bargaining. *See e.g.*, *United States v. Bass*, 536 U.S. 862, 864 (2002) (granting certiorari where lower decision was "contrary" to Supreme Court case); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "because the ... holding is in direct conflict with our precedents).

Third Petitioners' "prompt resolution" argument for deviating from the standard ripeness analysis is also not supported by the facts. Petitioners argue that allowing negotiations over the seniority integration issue to continue would cause the dispute to "fester." (Pet. 10). But the Ninth Circuit reached the contrary conclusion, i.e., that allowing the unripe DFR claim to proceed here would only *prolong* the seniority dispute because: "[f]orced to bargain for the Nicolau Award, any contract USAPA could negotiate would undoubtedly

---

[15] *United Parcel* addressed what state statute of limitations period to borrow on a section 301 Labor Management Relations Act claim.

be rejected by its membership." 606 F.3d at 1180, fn. 1. In short, the facts of this case establish that allowing this unripe DFR claim to proceed would only prolong the internal dispute – not end it.

Even more fundamentally, ripeness goes to a constitutional prerequisite for jurisdiction under Article III. Any plaintiff can point to an interest in prompt resolution of its claim, but if that claim is not ripe such that, as found here – no injury has occurred and may never occur – then Article III forbids any federal court to hear it. No alleged federal question is more important than compliance with the Constitution and nothing is more primary to the federal judiciary than compliance with its jurisdictional limitations.

Fourth, there is no conflict with the McCaskill-Bond Amendment since, under its express terms, the statute has no application to mergers occurring prior to December 26, 2007.[16] Moreover, even if this temporal prerequisite had been satisfied, the statute would still be inapplicable, since the McCaskill-Bond Amendment has no application where, as in the instant matter, the two employee groups are both represented by the same union.[17] As

---

[16] *See* Pub. L. 110-161, Div. K, Title I, § 117, Dec. 26, 2007, 121 Stat. 2383 (c), providing that: "Application. This section shall not apply to any covered transaction involving a covered air carrier that took place before the date of enactment of this Act [Dec. 26, 2007]".

[17] *See* Pub. L. 110-161, Div. K, Title I, § 117, Dec. 26, 2007, 121 Stat. 2383 (a), providing that: "Labor Integration: With respect

recognized by the Ninth Circuit, Petitioners' principal objection is to the East pilots' exercise of the democratic veto allowed to them under ALPA Merger Policy and the subsequent efforts by ALPA and USAPA to resolve the resulting impasse. The McCaskill-Bond Amendment effectively prohibits federal interference in such internal union processes. In short, the policy embodied in McCaskill-Bond is precisely the opposite of what Petitioners pretend it to be.

Petitioners concede that the ALPA arbitration was "not conducted pursuant to McCaskill-Bond" yet falsely assert that, "it was conducted pursuant to the same Allegheny-Mohawk Labor Protective Provisions" that McCaskill-Bond incorporates. (Pet. 11, fn. 6). That is not accurate, has never before been alleged by Petitioners, and was not considered or found by the district court or the Ninth Circuit. Rather, the internal-ALPA arbitration that resulted in the Nicolau award was conducted under ALPA's

---

to any covered transaction involving two or more covered air carriers that results in the combination of crafts or classes that are subject to the Railway Labor Act [Act May 20, 1926, c. 347, 44 Stat. 577] (45 U.S.C. § 151 *et seq.*), sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the integration of covered employees of the covered air carriers; except that (1) if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section;" (emphasis added).

internal merger policy, prior to the enactment of McCaskill-Bond.

Finally, even if the statute "demonstrates a heightened federal interest in obtaining prompt resolution of seniority disputes arising from airline mergers" (Pet. 12), McCaskill-Bond creates no exception to the final product rule, nor in anyway addresses when a DFR claim becomes ripe.

Fifth, contrary to Petitioners' claim of a "conflict with federal policy," the final product rule, which the Ninth Circuit here applied to undisputed facts, has been widely followed and is settled jurisprudence with respect to DFR claims. Any other rule would necessarily entangle the federal courts with collective bargaining – contrary to law and policy protecting and encouraging collective bargaining as well as union self-governance.

The Ninth Circuit stated: "Our conclusion that Plaintiffs' claim is not ripe is consistent with our DFR decisions, which have found DFR violations based on contract negotiation only after a contract has been agreed upon." 606 F.3d at 1181 (*citing Williams v. Pac. Mar. Ass'n*, 617 F.2d 1321, 1328, 1330 (9th Cir. 1980); *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 215 (9th Cir. 1989); *Hendricks v. Airline Pilots Ass'n*, 696 F.2d 673, 674-75 (9th Cir. 1983)).[18] Other circuits are in accord holding that a

[18] The Ninth Circuit also noted this result was "consistent with our cases analyzing accrual of DFR claims that are based on a

DFR action accrues when a contract is executed or becomes effective. *See e.g.*, *Bensel v. Allied Pilots Ass'n.*, 387 F.3d 298 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005); *Ramey v. Machinists Dist. 141*, 378 F.3d 269 (2d Cir. 2004); *Hagerman v. Transportation Union*, 281 F.3d 1189 (10th Cir. 2002); *Barlow v. American Nat'l Can Co.*, 173 F.3d 640, 643-45 (8th Cir. 1999); *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964-65 (D.C. Cir. 1995) (ongoing negotiations insufficient to create a "controversy"); *Ratkosky v. Transp. Union*, 843 F.2d 869, 873 (6th Cir. 1988); *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985). So too are district courts. *See e.g.*, *Breeger v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009)[19]; *Huff v. Int'l Union of Sec. Officers*, 2002 U.S. Dist. LEXIS 2003, at *17-18 (N.D. Cal. Jan. 31, 2002); *Dolan v. Ass'n of Flight Attendants*, 1996 U.S. Dist. LEXIS 3342 at *14 (N.D. Ill. Mar. 20, 1996) ("whether the union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular

---

union's alleged errors outside the contract negotiation process. In the grievance context, too, we have required that a final outcome be reached before allowing a suit based on a union's allegedly violative conduct that led to the decision." *Id* at 1183 (*citing Kozy v. Wings W. Airlines, Inc.*, 89 F.3d 635 (9th Cir. 1996)).

[19] In *Breeger*, a federal court, following the final product rule set forth in *O'Neill*, dismissed an action against Respondent for lack of ripeness based on a DFR claim by East pilots attacking the same seniority proposal at issue here. The *Breeger* dismissal was issued prior to conclusion of trial in this matter.

bargaining position is an issue that is not appropriate for judicial decision"). Authoritative labor law treatises have reached the same conclusion. *See* William W. Osborne, Jr., *Labor Union Law and Regulation*, Ch. 4, § VI.A.2 at 4-29 (BNA Supp. 2007) ("If the claim involves the negotiation of a new contract, the claim accrues on the contract's effective date").

The final product rule is a bright line that has served the ripeness analysis for DFR claims well for the simple reason noted by the Ninth Circuit, i.e., that until there is a final contract there *may not even be any actionable injury*. 606 F.3d 1180. As the Ninth Circuit noted, the "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 1185 (*quoting Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985)). In this way, the final product rule protects collective bargaining, required under the RLA, from undue judicial interference. *See e.g.*, *O'Neill*, 499 U.S. at 78 ("any substantive examination of a union's performance ... must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities" ... Congress did not "intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union"); *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) (courts and government may not impose collective

bargaining results); *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters*, 275 F. Supp. 986, 993 (S.D.N.Y. 1967) ("It is plain ... that under the statutory scheme of the [RLA] Congress has circumscribed the role of the courts").

Moreover, the final product rule promotes the long-standing federal policy of non-interference with union self-governance.[20] *See e.g.*, LMRDA, 29 U.S.C. § 401(a) ("Congress finds that ... it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection"); *Sergeant v. Inlandboatman's Union*, 346 F.3d 1196, 1203 (9th Cir. 2003) (pursuant to LMRDA, deferring to union's

---

[20] The decision of what a union will propose to an employer in collective bargaining is an internal union matter in the first and last instance. Here, there is no dispute that USAPA was certified as the representative of the pilots at US Airways by the National Mediation Board (NMB) in accordance with the RLA (45 U.S.C. § 152, Ninth), that this followed a valid, democratic election conducted under the auspices of the NMB with a majority of voting pilots selecting USAPA, as is their right under the RLA (*Id.* §152 Fourth), and that following certification, USAPA duly adopted a constitutional provision setting forth an objective of seniority integration based on date-of-hire principles modified by "conditions and restrictions" that were designed to protect "each pilot's un-merged career expectations." Moreover, date-of-hire has long been recognized as the 'gold standard' for seniority integration. *Humphrey v. Moore*, 375 U.S. 335, 348 n. 10 (1964); *Laturner v. Burlington N., Inc.*, 501 F.2d 593, 599 (9th Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975) (citing *Humphrey* for the same).

interpretation of its constitution); *Sim. v. New York Mailers Union No. 6*, 166 F.3d 465 (2d Cir. 1999) (same); *Newell v. Electrical* Workers 789 F.2d 1186 (5th Cir. 1986) (same); *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) (same); *See also Local No. 48, United Bhd. of Carpenters & Joiners of America v. United Bhd. of Carpenters & Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990); *Motion Picture & Videotape Editors Guild, Local 776 v. International Sound Technicians, Local 695*, 800 F.2d 973, 975 (9th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); *Jou-Jou Designs, Inc. v. International Ladies Garment Workers Union*, 643 F.2d 905, 911 (2d Cir. 1981); *Tincher v. Piasecki*, 520 F.2d 851, 854 (7th Cir. 1975).

To abandon the final product rule as Petitioners demand would open the proverbial flood gates to litigants seeking to dictate labor contracts in federal courts rather than at the bargaining table as Congress intended.

II. The Mere Allegation That The Ninth Circuit's Ripeness Analysis Was Incorrect Is Not A Valid Ground For Review.

The second of Petitioners' two arguments appears to be that the "Ninth Circuit misapplied prudential ripeness," because the Ninth Circuit erred in assessing the "hardship of postponing adjudication" particularly the hardship of their

"wast[ed] ... time, effort and expense [which] is surely a burdensome hardship." (Pet. 15-18). This argument falls well short of establishing any grounds for review:

First, the argument that the Ninth Circuit simply *erred* in its analysis of ripeness is no ground to review its holding, even if wrong, because this Court does not sit to merely correct alleged errors of lower courts, nor to reassess evidence and facts already assessed. Here, it is beyond dispute that the Ninth Circuit carefully considered and rejected, Petitioners' argument that their claim was ripe based on "hardship." *See* 606 F.3d 1180-81 ("we also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots"). That review specifically addressed the facts and evidence proffered by Petitioners to show injury, including furloughs and the so-called "lost opportunity to have a CBA implementing the Nicolau Award." *Id.* at 1180. The "lost opportunity" argument is the very same argument that Petitioners now urge this Court to re-consider (Pet. 17: "the precise legal question to be answered here is whether USAPA is breaching its duty of fair representation by refusing to support the Nicolau award...").

However, under the established jurisprudence of this Court, when review is sought merely to correct alleged errors of lower courts – even when there is error – certiorari will typically be denied.

The Court will "rarely" grant review where a lower court has arguably misapplied a "properly stated rule of law." Sup. Ct. R. 10. *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("this Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). Also, when review is sought merely to analyze the particular facts or evidence involved, certiorari will typically be denied. *See e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925) ("we do not grant certiorari to review evidence and discuss particular facts"); *see also Texas v. Mead*, 465 U.S. 1041 (1984); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n. 1 (1981) (improvident grant of cross-petition that presented "primarily a question of fact ... which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962) (same); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924) (same). As Petitioners' second argument merely seeks to have this Court re-do the same hardship analysis already done by the Ninth Circuit pursuant to settled law, it is no ground to grant review.

Second, Petitioners focus on only one prong of the ripeness analysis, prudential concerns (to the exclusion of the other[21]), and then argue only that

---

[21] The Petition fails to address the entire analysis, but the Ninth Circuit found that "*Both* factors [fitness of the issues and hardship] militate in favor of finding this claim premature." 606 F.3d at 1179 (emphasis added).

the "hardship" that was not correctly assessed by the Ninth Circuit springs from either the lack of an "alternative forum that might resolve" their DFR claim, or merely Petitioners' expense incurred to date in litigating their unripe DFR claim. This argument misconstrues both the ripeness analysis and the ruling of the Ninth Circuit.

The 'lack of an alternative forum' argument wholly fails to comprehend the Ninth Circuit's ruling. The Ninth Circuit specifically found, as part of its hardship analysis, that the mere exclusion of the Nicolau list from the seniority proposal by USAPA was inconsequential to showing an injury, and hence to stating a DFR claim:

> We conclude that this case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying injury. At this point, neither the West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA. Likewise, it is not certain whether that proposal will be ratified by the USAPA membership as part of a new, single CBA. Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal *whatever*

> *USAPA's final proposal ultimately is. Id.* 1180. (emphasis added).
>
> ***
>
> USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, *even if that proposal is not the Nicolau Award. Id.* at 1181. (emphasis added).
>
> ***
>
> We note, as the district court recognized, that *USAPA is at least as free to abandon the Nicolau* Award as was its predecessor, ALPA. *Id.* n. 3. (emphasis added).

Accordingly, the Ninth Circuit found that because of the noted contingencies of a contract yet to be negotiated or ratified, Petitioners' DFR claim targeting a seniority proposal is not ripe for adjudication. Thus, the "alternative forum" for the DFR claim is immaterial not only because no DFR claim has yet arisen, but also because it *might never arise.*[22]

---

[22] Moreover, even had Petitioners waited until there was a contract that did not include Nicolau, that fact alone would not state a valid DFR claim under settled law. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (without more, merely alleging that a union's conduct favored one group over another does not constitute a breach of the duty of fair representation); *see also Merritt v. IAM Dist. 143*, 613 F.3d 609, 620-21 (6th Cir. 2010); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988); *Hardcastle v. W. Greyhound Lines*, 303 F.2d 182, 185 (9th Cir. 1962) ("a seniority system in a collective

In this sense, the only "alternative forum" that *is* material is exactly as the Ninth Circuit found, the union's internal governance and collective bargaining:

> By deferring judicial intervention, we leave USAPA to bargain in good faith pursuant to its DFR..." *Id.* n. 1, and;
>
> there is no disputing that this case would be the first time we allowed a DFR suit to proceed in a collective bargaining/contract negotiating context before the CBA at issue was ratified. Such a departure from the norm would invite parties to bring suit long before internal disputes have had a chance to work themselves out. *Id.* at 1181 n. 4.

The Ninth Circuit's observations underscore that the "alternative forum" for the *seniority dispute*, as opposed to the unripe DFR claim, is left to internal union governance and the collective bargaining process. The forum of a federal court will become immediately available to Petitioners if and

---

bargaining agreement that favors one group more than another does not in itself constitute a breach of the union's duty [of fair representation]"). Moreover, seniority rights "are creations of the collective bargaining agreement, and so may be revised or abrogated by later negotiated changes in this agreement." *Hass v. Darigold Dairy Prods.*, 751 F.2d 1096, 1099 (9th Cir. 1985).

when their DFR claim becomes ripe.[23]

Third, the other source of "hardship" that Petitioners argue the Ninth Circuit erred by failing to consider in its prudential-concern analysis of ripeness is, starkly, the expense born by the Petitioners in litigating their unripe claim. This, they argue, "must be considered and given substantial weight" (Pet. 18) especially when Petitioners have "at a cost of $1.8 million in legal fees, obtained an order" (Pet. i) that is now rendered a legal nullity because the district court never had jurisdiction.

Petitioners' argument in this respect is easily dispensed with. This Court has rejected the identical argument in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998). In *Ohio Forestry*, this Court affirmed a Sixth Circuit ruling finding a claim unripe that was made pursuant to the National Forest Management Act. On review, Petitioner in *Ohio* argued, as do Petitioners here, that it would be "easier and certainly cheaper" to pursue their unripe legal claim now rather than to

---

[23] If, however, Petitioners maintain that they have a contractual entitlement to implementation of the Nicolau Award, such a contract-based claim, under RLA jurisprudence would constitute a "minor dispute" within the exclusive jurisdiction of a system board of adjustment. *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 310 (1989); *see also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322-24 (1972); *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 36-38 (1963).

repeat the process later. *Id.* at 734. But this Court determined that argument was insufficient, stating:

> [T]he Court has not considered this kind of litigation cost-saving [argument] sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – post-implementation litigation *See, e.g., ibid.* ("The case-by-case approach ... is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's ... forests ... But this is the traditional, and remains the normal, mode of operation of the courts"); *FTC v. Standard Oil Co.*, 449 U.S. 232, 244, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 39 L. Ed. 2d 123, 94 S. Ct. 1028 (1974); *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209, 222, 82 L. Ed. 1294, 58 S. Ct. 834 (1938).

Id. at 735.[24] Clearly, any other result would allow litigants to carve a hole in Article III simply based

---

[24] Petitioners never raised the issue of litigation expense as a basis for ripeness in any court below. However, the Ninth Circuit did, in fact, recognize that "considerable time, effort,

on expenditure of legal fees, surely a boon for attorneys, but not so much for the courts – or the Constitution.

CONCLUSION

Petitioners present no reason, let alone a "compelling reason," for their Petition to be granted. *See* Sup. Ct. R. 10. They fail to demonstrate that the Ninth Circuit's June 4, 2010 Opinion finding the DFR claim unripe is in conflict with any decision of this Court because, on the contrary, it is consistent with *O'Neill* and its progeny. They do not show that the Ninth Circuit decided an important federal question that has not been settled by this Court. Nor do Petitioners even allege a conflict with any other courts. *See* Sup. Ct. R. 10(a)-(c). Therefore, Respondent respectfully requests that the Petition be denied.

---

and expense have been devoted to the merits of Plaintiffs' DFR claim." 606 F.3d at 1179. With this in mind, the Ninth Circuit correctly found the claim unripe by following this Court's directive in *Ohio Forestry*, which explained that for purposes of the ripeness analysis "the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of litigation." 523 U.S. at 735.

Respectfully submitted,

LEE SEHAM
Counsel of Record
LUCAS K. MIDDLEBROOK
STANLEY SILVERSTONE
SEHAM, SEHAM, MELTZ &
PETERSEN, LLP
445 Hamilton Avenue
Suite 1204
White Plains, NY 10601
(914) 997-1346

NICHOLAS P. GRANATH
SEHAM, SEHAM, MELTZ &
PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405
(612) 341-9080

November 17, 2010 *Attorneys for Respondent US Airline Pilots Association*

APPENDIX

APPENDIX A — STIPULATED STATEMENT OF FACTS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED NOVEMBER 3, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CASE NO. 2:08-CV-1633 NVW

DON ADDINGTON; JOHN BOSTIC; MARK BURMAN; AFSHIN IRANPOUR; ROGER VELEZ; and STEVE WARGOCKI; individual residents of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.,

Plaintiffs,

vs.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways Inc.; and US AIRWAYS, INC., a Delaware corporation;

Defendants.

STIPULATED STATEMENT OF FACTS RE: PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

The parties, through counsel, stipulate that the following uncontested facts may be considered by the Court, without further proof, in connection with

Appendix A

Plaintiffs' Application for Preliminary Injunction, heard on October 29, 2008 and currently under advisement.

1. Terms :

a) "Merger" to refer to the merger event referred to in Paragraph 2, herein;

b) "US Airways" to refer to the pre-merger air carrier;

c) "Defendant US Airways" to refer to the post-merger air carrier;

d) "West CBA" to refer to the collective bargaining agreement originally between America West and the Air Line Pilots Association (ALPA) on behalf of the West Pilots.

e) "West Pilots" to refer, as individuals and as a group (unless otherwise indicated), to the pilots on the seniority list incorporated into the West CBA.

f) "East CBA" to refer to the collective bargaining agreement originally between US Airways and ALPA on behalf of the East pilots;

g) "East Pilots" to refer, as individuals and as a group (unless otherwise indicated), to the pilots on the seniority list incorporated into the East CBA;

h) "West and East Pilots" refers to the entire group of pilots on both West CBA and East CBA seniority lists, and individuals on those lists;

i) "Furloughed Pilots": refers to those US Airways pilots who were on furlough and not actively flying for US Airways at the time of the merger.

j) "New Hire Pilots": refers to those US Airways pilots who were not employed by, or on furlough from US Airways or America West at the time of the merger, and started employment with Defendant US Airways after the merger.

k) "Separate Operations" refers to those provisions defined in Section II.A of the Transition Agreement, including the provisions of Section II.B.

2. In May 2005, two air carriers, America West Airlines, Inc. ("America West") and US Airways, Inc., agreed to merge such that they would combine all or substantially all their assets. Defendant US Airways, Inc. is obligated under the terms of the collective bargaining agreements governing pilots of the two pre-merger air carriers.

3. Plaintiff Don Addington is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

4. Plaintiff John Bostic is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

5. Plaintiff Mark Burman is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

6. Plaintiff Afshin Iranpour is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

7. Plaintiff Roger Velez is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

8. Plaintiff Steve Wargocki is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

9. Defendant US Airways is a Delaware corporation with its principal place of business in Tempe, Arizona.

10. At all times relevant to this action, Defendant US Airways has engaged in interstate commerce in the industry of air transportation, and has been an employer in an industry affecting interstate commerce.

11. Defendant US Airline Pilots Association ("USAPA") is an unincorporated association with a principal place of business in Charlotte, North Carolina.

12. The National Mediation Board ("NMB") certified USAPA as the collective bargaining representative of the pilots employed in the service of Defendant US Airways on April 18, 2008.

13. These claims arise under the RLA, 45 U.S.C. § 151, *et seq.*

14. In December 2003, America West and the ALPA entered into a written agreement defining the terms of the West CBA. Plaintiffs refer to that document as the "*2004 CBA*." The West CBA, as defined by the *2004 CBA*, became effective in January, 2004, and was to become amendable on December 31, 2006.

15. The *2004 CBA* is attached here as Exhibit A.

16. The wages, benefits and conditions of work required by the East CBA are different in some respects than the wages, benefits and conditions of work required by the West CBA. On September 23, 2005, Defendant US Airways (as America West and US Airways), and ALPA on behalf of West and East Pilots entered into the "*Transition Agreement.*"

17. US Airways and America West and their respective holding companies, through their designated agents and representatives were parties to the Transition Agreement, and designated as the "Airline Parties."

18. A true and correct copy of the *Transition Agreement* may be admitted into evidence.

19. The terms of ALPA Merger Policy are set out in a document, entitled "*Section 45 – Merger And Fragmentation Policy*" and dated August 10, 2005.

20. A true and correct copy of *ALPA Merger Policy* is attached here as Exhibit C.

21. Pursuant to ALPA Merger Policy, in October 2006, the US Airways MEC and the America West MEC referred their dispute to mediation and arbitration.

22. Mediation of the dispute was not successful.

23. Arbitration was conducted by an Arbitration Board chaired by George Nicolau.

24. The ALPA West and East MEC's through their appointed representatives agreed to rules and procedures set out in a document entitled "*Ground Rules For The US Airways-America West Pilot Seniority Integration Arbitration.*" A true and correct copy of this document may be admitted into evidence.

25. The East and West ALPA MEC merger representatives agreed that the document entitled "*Conditions and Restrictions*" would apply to the arbitration. A true and correct copy of this document may be admitted into evidence.

26. The East and West ALPA MEC merger representatives submitted their dispute to a Board of Arbitration chaired by George Nicolau (the "Nicolau Arbitration"). The decision of Arbitrator George Nicolau was issued in May 2007.

27. A true and correct copy of the Nicolau Award, entitled, "*In The Matter Of The Seniority Integration Of The Pilots Of US Airways, Inc. And The Pilots Of America West Airlines, Inc.*", may be admitted into evidence.

28. The West ALPA MEC was represented in the Nicolau Arbitration by merger representatives appointed by the West ALPA MEC.

29. The East ALPA MEC was represented in the Nicolau Arbitration by merger representatives appointed by the East ALPA MEC.

30. The Nicolau Award has not been set aside, vacated, or modified by any court of competent jurisdiction.

31. Between the effective date of the merger and September 1, 2008, Defendant US Airways has hired approximately 87 "New Hire" pilots to work as East Pilots.

32. Between the effective date of the merger and September 1, 2008, the active roster of West Pilots has decreased.

33. Between the effective date of the merger and September 1, 2008, the active roster of East Pilots has increased.

34. Between the effective date of the merger and September 1, 2008, the increase in the active roster of East Pilots includes both "New Hire Pilots" and "Furloughed Pilots."

35. On or about June 12, 2008, Defendant US Airways announced plans to furlough approximately 300 pilots by April 2009.

36. US Airways plans, as part of the 300, to furlough 140 West Pilots (not including New Hire Pilots).

37. On October 1, 2008, US Airways furloughed approximately 43 West Pilots assigned to fly West aircraft.

38. On October 1, 2008, US Airways furloughed approximately 14 New Hire Pilots assigned to fly West aircraft.

39. US Airways has scheduled an additional 53 West Pilots to be furloughed on November 1, 2008.

40. In the current reduction in force, West Pilots have been or will be furloughed before the furlough of East Pilots who had been on furlough status at the time of the merger but were recalled by Defendant US Airways after the merger.

41. US Airways furloughed Plaintiff John Bostic on October 1, 2008.

42. US Airways will furlough Steve Wargocki on November 1, 2008.

43. In December 2007, Defendant US Airways accepted the Nicolau List.

44. Since acceptance of the Nicolau List, Defendant US Airways has not yet integrated operations by negotiating and obtaining ratification of a single collective bargaining agreement that would implement an integrated seniority list.

45. Certain East Pilots formed Defendant USAPA.

46. USAPA has submitted a proposal for a date-of-hire based seniority policy, including conditions and restrictions, to US Airways.

47. In early 2008, the National Mediation Board ("NMB") determined that the West and East Pilots constituted a single craft for purposes of labor representation.

48. USAPA campaigned to become the certified labor representative of the West and East Pilots.

49. The East operation has a greater number than the West operation.

50. During the election campaign, USAPA promised that if it were elected the labor representative it would follow USAPA's Constitution.

51. On or about April 18, 2008, USAPA became the certified labor representative.

52. USAPA has submitted a proposal to US Airways for a seniority list including conditions and restrictions. In the parties' negotiating sessions, US Airways has not yet responded to or discussed the USAPA seniority proposal.

53. USAPA has not incorporated, included or adopted the integrated seniority list established by the Nicolau Award in any proposal to US Airways.

CERTIFICATION

I, Don Stevens, certify that I have personally conferred with Defendant US Airways, through its counsel Tom Jerman, Esq. and Rachel Janger, Esq. and with Defendant USAPA, through its counsel Lee Seham, Esq. and Lucas K. Middlebrook, Esq. to reach agreement on the foregoing Stipulated Facts. Counsel for each Defendant has authorized the undersigned to file the foregoing with the Court as an agreed upon Stipulation of Facts.

Dated this 3rd day of November, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/ Don Stevens

3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Attorneys for Plaintiffs

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 08-1633-PHX-NVW
(consolidated)

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki,

Plaintiffs,

vs.

US Airline Pilots Association; US Airways, Inc.,

Defendants.

CV08-1728-PHX-NVW

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, et al.,

Plaintiffs,

vs.

Steven Bradford; Paul Diorio; Robert Frear; Mark King; Douglas Mowery; John Stephan, et al.,

Defendants.

ORDER

Appendix B

A. TRIAL COUNSEL FOR THE PARTIES

Plaintiffs:

Marty Harper, Esq. (#003416);
mharper@polsinelli.com
Kelly J. Flood, Esq. (#019772);
kflood@polsinelli.com
Don Stevens, Esq. (#004265);
dstevens@polsinelli.com
Andrew S. Jacob, Esq. (#22516);
ajacob@polsinelli.com
Katie Brown, Esq. (#26546);
kvbrown@polsinelli.com
POLSINELLI SHUGHART, P.C.
3636 N. Central Ave., Suite 1200,
Phoenix, AZ 85012
Phone: (602) 650-2000 Fax: (602) 264-7033

Defendant:

Lee Seham, Esq. (*pro hac vice*)
lseham@ssmplaw.com
Lucas Middlebrook, Esq. (*pro hac vice*)
lmiddlebrook@ssmplaw.com
Stanley Silverstone, Esq. (*pro hac vice*)
ssilverstone@ssmplaw.com
Theresa Murphy, Esq. (*pro hac vice*)
tmurphy@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204,
White Plains, NY 10601
Phone: (914) 997-1346 Fax: (914) 997-7125

Appendix B

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd., Minneapolis, MN 55405
Phone 612 341 9080 Fax 612 341-9079

James K. Brengle, Esq. (*pro hac vice*)
JKBrengle@duanemorris.com
DUANE MORRIS, LLP
30 South 17th Street,
Philadelphia, PA 19103-4196
Phone: (215) 979-1512 Fax: (215) 979-1020

Stanley Lubin, Esq., (#016473)
stan@lubinandenoch.com
Nick Enoch, Esq., nick@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel.: 602 234-0008
Fax: 602 626 3586

B. STATEMENT OF JURISDICTION.

1. Plaintiffs contend that the First Amended Complaint raises a federal question claim. 45 U.S.C. § 151, *et seq.* There is jurisdiction under Title 28 U.S.C. §1331. *See Air Line Pilots Assn, Intl. v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir. 1987) (noting that NMB jurisdiction is limited to determine "who is the employees' representative").

2. Defendants dispute subject matter jurisdiction on four grounds: i) the case is not ripe for adjudication; ii) plaintiffs fail to state a legally cognizable claim; iii) this dispute is within the exclusive jurisdiction of the System Board of Adjustment and/or will pre-judge factual and contractual interpretation issues that are pending before the System Board of Adjustment per order of this Court; iv) the National Mediation Board has exclusive jurisdiction over all election related disputes.

C. STIPULATIONS AND UNCONTESTED FACTS AND LAW

1. The following material facts are admitted or stipulated to by the parties and require no further proof:

1. Plaintiff Don Addington is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

2. Plaintiff John Bostic is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

3. Plaintiff Mark Burman is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

4. Plaintiff Afshin Iranpour is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

5. Plaintiff Roger Velez is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

6. Plaintiff Steve Wargocki is a resident of the State of Arizona, who at all times relevant to this Complaint has been a West Pilot.

7. US Airways is a Delaware corporation with its principal place of business in Tempe, Arizona. At all times relevant to this action, US Airways has engaged in interstate commerce in the industry of air transportation, and has been an employer in an industry affecting interstate commerce.

8. At the time of the merger and at all times until April 18, 2008, the Air Line Pilots Association ("ALPA") represented both the US Airways ("East") and the America West ("West") pilots as the sole bargaining representative of the pilots.

9. In May 2005, two air carriers, America West Airlines, Inc. ("America West") and the premerger US Airways, Inc., agreed to merge such that they would combine all or substantially all of their assets.

10. The surviving entity is known as "US Airways." To distinguish it from the premerger entity by the same name, it is referred to hereinafter as the "Airline."

11. On September 23, 2005, the two airlines and ALPA entered into the "Transition Agreement," which

was for the purpose of governing the process of the airlines' operational merger as it related to the airline pilots.

12. Under then-existing ALPA Merger Policy, the Arbitration Board is composed of two non-voting ALPA members chosen from the Master List of Pilot Neutrals. The third member and Chairman of the Board was required to be chosen from a list of Arbitrators approved by ALPA.

13. The Arbitration Board must render a seniority integration decision consistent with the criteria set forth in ALPA Merger Policy.

14. The parties to the Nicolau Arbitration were stated to be "the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives."

15. The decision of Arbitrator George Nicolau was issued in May, 2007.

16. The Nicolau Award generated considerable negative reaction among many East pilots. On or about July 25, 2007, the East MEC determined that the East pilots would never ratify a single collective bargaining agreement that incorporated the Nicolau List.

17. A majority of East Pilots strenuously objected to the Nicolau Award and were opposed to its implementation.

Appendix B

18. From August 15, 2007 through the date of loss of ALPA's representation status on April 18, 2008, there were no further negotiations toward a single collective bargaining agreement.

19. The Transition Agreement states that the parties shall maintain "Separate Operations" until the implementation of a single collective bargaining agreement covering both pilot groups. During Separate Operations, East and West aircraft may only be flown by East and West pilots respectively, unless otherwise permitted or agreed under the Transition Agreement.

20. Both the Transition Agreement and ALPA Merger Policy states that the Airline may not use the single seniority list until an agreement is reached on a single collective bargaining agreement covering both pilot groups, unless otherwise agreed to by all of the parties.

21. At this time, the Airline is still conducting separate pilot operations where each pilot group works under a different pilot collective bargaining agreement that utilizes its own seniority list.

22. Defendant US Airline Pilots Association ("USAPA") is an unincorporated association with a principal place of business in Charlotte, North Carolina.

23. After an election, the National Mediation Board ("NMB") certified USAPA as the collective

bargaining representative of the pilots employed in the service of the Airline on April 18, 2008.

24. The USAPA Merger Committee presented its seniority integration proposal to the Airline on September 30, 2008. The Airline has not yet responded to the USAPA seniority integration proposal.

2. The following facts are subject to further rulings from the Court regarding relevance, materiality, foundation and completeness. Both Plaintiffs and USAPA have proposed Statements of Fact that can be resolved after the Motions in Limine are ruled upon and the issues at trial are narrowed in the pretrial conference.

Plaintiffs' Proposed Undisputed Facts Not Agreed to by USAPA:

(Plaintiff's trial exhibit number and the source document are identified. If USAPA will agree to the admission of the source documents, then these additional facts would not require any valuable trial time.)

25. Terms: Plaintiff contends that the parties should be able to agree to a single and consistent set of terms to use during the trial to avoid juror confusion. The parties have not been able to reach complete agreement on these terms.

Appendix B

a) "Merger" to refer to the merger between US Airways and America West Airlines.

b) "US Airways" to refer to the pre-merger air carrier;

c) "Airline" will refer to the post-merger air carrier now flying under the US Airways name;